

**INDUSTRIAL DISPUTES TRIBUNAL****Dispute No.: IDT 34/2011**

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**SETTLEMENT OF DISPUTE****BETWEEN****ATL GROUP PENSION FUND TRUSTEES NOMINEE LIMITED****AND****MISS CATHERINE BARBER****AND THE*****AWARD*****I.D.T. DIVISION****MR. NORMAN WRIGHT, Q.C.      -      CHAIRMAN****MR. RION HALL                      -      MEMBER****MR. D. TREVOR McNISH        -      MEMBER****SEPTEMBER 23, 2015.**

**IDT 34/2011**

**INDUSTRIAL DISPUTES TRIBUNAL**

**AWARD**

**IN RESPECT OF**

**AN INDUSTRIAL DISPUTE**

**BETWEEN**

**ATL GROUP PENSION FUND TRUSTEES NOMINEE LIMITED**

**(THE COMPANY)**

**AND**

**MISS CATHERINE BARBER**

**(THE AGGRIEVED)**

**REFERENCE:**

By letter dated November 23, 2011 the Honourable Minister of Labour and Social Security pursuant to Section 11A. (1) (a) (i) of the Labour Relations and Industrial Disputes Act of 1975 (hereinafter called "the Act"), referred to the Industrial Disputes Tribunal for settlement in accordance with the following Terms of Reference, the industrial dispute described therein:-

The Terms of Reference were as follows:

*"To determine and settle the dispute between ATL Group Pension Fund Trustees Nominee Limited on the one hand and Miss Catherine Barber on the other hand over her dismissal."*

### **DIVISION:**

The division of the Tribunal which was selected in accordance with Section 8(2) (c) of the Act and which dealt with the matter comprised:

Mr. Norman Wright, Q.C.	-	Chairman
Mr. Rion Hall	-	Member
Mr. D. Trevor McNish	-	Member

### **REPRESENTATIVES OF PARTIES:**

The **Company** was represented by:

Mr. Hugh Wildman	-	Attorney-at-Law
Mr. Jerome Spencer	-	Attorney-at-Law
Mr. Miguel William	-	Attorney-at-Law

The **Aggrieved worker** was represented by:

Mr. Gavin Goffe	-	Attorney-at-Law
Mr. Jermaine Case	-	Attorney-at-Law

In attendance was **Miss Catherine Barber** - Aggrieved Worker

### **SUBMISSIONS AND SITTINGS:**

Briefs were submitted by the parties and oral submissions made during twelve (28) sittings, from April 24, 2012 to July 8, 2015.

### **BACKGROUND TO THE DISPUTE:**

Appliance Traders Group Pension Fund Trustees Nominee Limited was founded by Gorstew. The Chairman at all material times was and still is Gordon "Butch" Stewart. The scheme is constituted under an Amended Trust Deed dated October 17, 2006 ("the Trust Deed") and Accompanying Rules ("the Rules"). The scheme is administered in accordance with the Rules with the intent and purpose of providing pension benefits for the employees of Gorstew Limited, its subsidiary and associated companies, who are eligible to participate in the scheme.

This dispute surrounds the dismissal of Miss Catherine Barber from the Appliance Traders Limited Group Pension Fund Trustees Nominee Limited on April 18, 2011. Miss Barber had been employed as General Manager of the ATL Pension Fund from June 26, 2000. It is the contention of ATL Pension Fund that Miss Barber's service was terminated due to loss of trust and confidence in her ability to dutifully and loyally serve it against the background of two incidents in which she was involved, namely:

- (a) The first was her involvement in a proposed sale of an apartment owned by the ATL Pension Fund to the then Chairman of the ATL Pension Fund and his wife; and
- (b) The second was her involvement in a scheme pertaining to the procurement of back-dated approvals from Gorstew Limited ("Gorstew") for the distribution of surpluses in the Appliance Traders Group Pension Scheme.

Arising from the above a dispute arose. The matter was referred to the Ministry of Labour where conciliation failed to resolve the dispute, as a result of which same was forwarded to the Industrial Disputes Tribunal for settlement.

#### **COMPANY'S CASE:**

The Company (ATL Group Pension Fund Trustees Nominee Limited) led evidence and made legal submissions in support of its contention that Catherine Barber's dismissal by letter dated April 15, 2011, was justified for the following reasons as summarized in the letter of termination:

- In 2007 Miss Barber failed to disclose to the Board of Trustees that the Chairman of the Board, Patrick Lynch, was interested in buying an apartment owned by the Company. Further, Miss Barber failed to inform the Board of Trustees that the Chairman had signed an agreement for the sale with an accompanying deposit.
- In December 2010, the issue arose whether the Company had obtained the consent of Gorstew to make distribution of surpluses. Despite several opportunities to

address the matter, Miss Barber failed to address the issue and then later relied on back-dated letters to provide support for the distribution of the surplus.

1. The dismissal of Miss Catherine Barber was justifiable because her admitted action in back-dating three letters, amounts to dishonesty and wrongly gave the impression to the Board of Trustees that there was written Approval of Gorstew to distribute surplus which were given on June 10, 1998, June 7, 2002 and May 12, 2005
2. Despite the fact that Miss Barber admitted in cross-examination that she reports to the Board of Trustees, her failure to report to the Board of Trustees fact that the written consent of Gorstew had not been obtained and instead back-dated the letters without their approval, is unacceptable behaviour.
3. Miss Barber's dishonest conduct, warranted termination of her employment with the Company. In addition, her conduct in failing to disclose the circumstances in which the Chairman of the Company had made a deposit and signed an agreement for sale for an apartment owned by the Pension Scheme, is in breach of her duty of trust and confidence and provides further support for the decision to terminate her. Whilst this was not the main ground for termination, it is a relevant factor and should assist the Panel in examining the matter in a holistic manner.
4. Due to Miss Barber being the General Manager of a Pension Scheme which handled significant sums, her duties and responsibilities were of a high standard. Miss Barber admitted that she had a duty of trust and confidence in the context that she was working for a trust Company and acting on behalf of approximately 5000 members, which has the handling of investments as one of its responsibilities. This must be borne in mind in determining whether her dismissal was justifiable. Under paragraph 6(iii) of the Labour Code it is made clear that:

*"(iii) some workers have special obligations arising out of the nature of their employment. Such worker when acting in the course of his employment should*

*be mindful of those obligations and should refrain from action which conflicts with them.” (emphasis added)*

5. Miss Barber admitted in cross-examination that she back-dated the letters for June 10, 1998, June 7, 2002 and May 12, 2005. Further, she also admitted that she did not receive any legal advice before taking the step of back-dating the letters. She claims that Miss Lynda Mair had agreed that she could take steps to regularize the 1992 and 1995 distributions which had proceeded without the written consent of Gorstew, but she did not seek advice on the method of doing so. The back-dating of the letters falsely gives the impression, that the letters were prepared on the respective dates, at the top of the letters.
6. The back-dating of letters is a dishonest practice and is made worse by the significant sums that each letter was dealing with. The letter of June 10, 1998, dealt with a distribution of surplus totalling \$113,000,000.00. The letter of June 7, 2002 dealt with a distribution of surplus \$201,600,000.00 and the letter of May 12, 2005 dealt with a distribution of surplus totalling \$408,200,000.00. In total, the letters which Miss Barber admitted to back-dating, concerned distribution of surplus totalling the sum of \$722,800,000.00, which is nearly three-quarters of a billion dollars.
7. The failure to comply with the Trust Deed in respect of sums totalling \$722,800,000.00, based on the advice of Miss Lynda Mair, possibly affected the validity of the distribution. Miss Barber had an obligation to bring this to the attention of the Board of Trustees. The failure to bring this matter to the attention of the Board of Trustees, is also a reasonable ground for dismissal of Miss Barber. Such behaviour is unacceptable and constitutes sufficient grounds for dismissal, especially as she was General Manager of the Scheme, which exists to provide a substantial benefit for thousands of employees and their families. Significantly, Miss Barber has provided no explanation for her failure to bring the back-dating of the letters to the attention of the Board.
8. The company has raised four points in respect of the Airdrie Apartment, namely:

- (i) The fact that Miss Barber did not disclose that the Chairman had signed an agreement and made a deposit on the Apartment
  - (ii) Miss Barber did not inform the Board of Trustees that the Chairman was proposing to acquire the Apartment, without a current valuation report and at an undervalue.
  - (iii) Miss Barber misled the Board in respect of the date of the last valuation with the sole purpose of leading the Board to believe that the price at which the Chairman agreed to buy the property, represented an excellent deal, and
  - (iv) Miss Barber withheld and misrepresented vital information regarding the Chairman's attempts at acquiring the Apartment.
9. In respect of Miss Barber's alleged discussions with Miss Lynda Mair, the following points have to be emphasized:
- 1. Miss Lynda Mair, based on the correspondence, was only contacted in respect of the 1992 and 1995 distributions.
  - 2. There is no written proof that Miss Barber informed Lynda Mair that there was no written consent of Gorstew for the 1998, 2000 and 2005 distributions, even though the legal advice was sought in 2007.
  - 3. Miss Barber did not receive legal advice from Miss Lynda Mair that she could back-date the letters. The back-dating of the letters was done on Miss Barber's instructions and on her own initiative.
  - 4. The draft-letter sent to Miss Lynda Mair, did not have a date and so she would not have been put on notice that the letters were going to be back-dated.
  - 5. Miss Lynda Mair raised doubts about the validity of the distributions if the consent of Gorstew was not obtained in writing, when she stated in her letter to Miss Barber, that if written consent was not obtained, she does not think the distributions were properly made. The possible invalidity of the distributions of hundreds of millions of dollars was not brought to the attention of the Board of Trustees by Miss Barber (nor was the attempted

regularization of the invalid distributions by back-dating the letters of consent, brought to their attention).

6. It was suggested in the Closing Submissions on behalf of Miss Barber, that Miss Lynda Mair must have known that the letters were being back-dated. This submission completely ignores the fact that Miss Barber stated in cross-examination that she did not seek legal advice on back-dating the letters. It is therefore incorrect to suggest that legal advice was given on back-dating the letters.
10. The evidence of Miss Barber regarding the circumstances surrounding the proposed sale of the Airdrie Apartment, is nebulous and inconsistent and gives rise to a possible conclusion, that she was involved in a clandestine scheme with Mr. Lynch, to withhold material information regarding the sale of the apartment from the Board, the ultimate objective being to have it sold to Mr. Lynch and his wife, at an undervalue.
11. Miss Barber's evidence discloses a complete disregard of her obligations to the collective Board of Trustees and the principles of good corporate governance. In fact, her handling of the attempted sale of the apartment to Mr. Lynch and his wife, reveals a level of deference wholly unsuited to someone whose loyalty lies ultimately with the Company and not the Chairman of the Board.
12. Based on the state of the law, in determining whether a dismissal was unjustifiable:
  - (1) The IDT is examining whether the dismissal was fair or reasonable.
  - (2) The IDT is a fact-finder using its original jurisdiction to make a determination
  - (3) The test the IDT is to apply is an objective test, taking into account a fully objective view of all the circumstances, whether known or unknown to the employer at the time of the dismissal.
  - (4) The IDT is not limited to the reasons stated in the termination letter. The proper test requires that the IDT considers all the evidence before it and ask itself the correct question, that is, whether, in all the circumstances, the dismissal was justifiable (fair and reasonable).

13. In this particular case the Panel will have to determine:

- (1) Whether the admitted back-dating of three letters, dealing with a distribution of surplus of hundreds of millions of dollars, is a reasonable basis on which to dismiss;
- (2) Whether the failure of Miss Barber to disclose to the Board of Trustees that the distribution of surplus was made without the written consent of Gorstew, as well as the fact that the distribution was probably made improperly, is a reasonable basis on which to dismiss; and
- (3) Whether Miss Barber's failure to disclose to the Board of Trustees the attempted purchase of the Airdrie Apartment by the Chairman of the Company and his wife signing the agreement for sale, paying the deposit and making a further payment, was by itself or together with back-dating of letters of consent, a reasonable basis for dismissal.

14. Under normal circumstances, we fully accept that the Company has to follow the Labour Code before dismissing an employee. However, this is a highly exceptional case. It is our submission that the strict application of provisions of the Labour Code is not appropriate. We say this for the following reasons:

- (a) Miss Barber has admitted to her dishonesty in back-dating the letters of consent and not disclosing this to the Board of Trustees, some four years after several opportunities were afforded her, to disclose her knowledge of the back-dated consents;
- (b) On December 15 and 16, 2010, she had the chance to disclose the back-dated consent letters but did not do so (equally, she had the chance to disclose the consent to Miss Lyn and Mrs. Bell-Wisdom, but did not do so);
- (c) On January 4, 2011, when she wrote to Mr. Singh, she made no mention of back-dating the consent letters; and
- (d) She failed to make use of the opportunity to address the issue of back-dating the consents, when Patterson Mair Hamilton wrote to her on March 30, 2011.

15. In summary, the Company has proved that the dismissal of Miss Barber is justifiable. The admitted back-dating of letters is a reasonable basis on which to dismiss and further, despite the fact that Miss Barber reports to the Board, she failed to inform the Board of Trustees of the lack of written consent and this is also a reasonable basis on which to terminate Miss Barber's employment. Her conduct in failing to fully advise the Board in relation to the Airdrie apartment sale agreement, should be taken into account, even though it is not the main reason for dismissal.
16. Alternatively, if the Tribunal disagrees and holds that Miss Barber was unjustifiably dismissed, reinstatement would not be the appropriate remedy, based on the admitted acrimony between the parties. Further, if any compensation is being awarded, it should be minimal / nominal, having regard to the existence of both mitigating and aggravating factors on both the employer and the employee's sides.

#### **CASE FOR THE AGGRIEVED:**

Miss Catherine Barber provided evidence during and by means of her testimony, cross-examination of witnesses as well as the presentation of legal submissions, in support of her contention, that she was unjustifiably dismissed.

1. On December 6, 2010, Miss Barber was summoned to a meeting at Mr. Gordon Butch Stewart's office. In that meeting, Miss Barber was accused by Mr. Stewart of authorising the allocation of the 2007 surplus in the pension fund to the members' accounts, without his permission. Miss Barber responded that it was not her decision to allocate the surplus, but rather was a decision of the subcommittee of the Board of the Pension Scheme.
2. Mr. Stewart continued his accusation, that he had not authorised the distribution and that his consent was required for any such distribution to occur. Miss Barber responded that it was the consent of Gorstew Limited that was required and that she had received a letter of consent duly signed by Dr. Jeffery Pyne, the Managing Director of Gorstew Limited. She offered to provide the relevant consent letter for review and subsequently went back to her office to retrieve, not only the letter, but the formal 2007 Valuation/Surplus

correspondence file. The 2007 Valuation/Surplus correspondence file was retained by Mr. Stewart.

3. By letter dated December 24, 2010, Mr. Lynch, Chairman of the Pension Scheme Board of Trustees, informed the legal officer in response to his query that:
  - i. Neither he nor any other director or officer of Gorstew Ltd, who participated in the meetings of the Board of Trustees, knew or should have known, that Dr. Jeffery Pyne did not have the authority to approve distributions of surpluses
  - ii. The Trustees did not know the limits of Dr. Jeffery Pyne's authority's as Managing Director of Gorstew Limited
  - iii. He saw the original approval letters on December 15, 2010, signed by Dr. Jeffery Pyne, as Managing Director.
4. Miss Barber is not a member of the Board of Gorstew Limited, nor is she a member of the Company's Board of Directors and so she would not be privy to the Board minutes or to information about Dr Pyne's alleged lack of authority.

No funds were paid out to any-one, otherwise than in the normal course of administering the Pension Scheme. The surplus was allocated to the accounts of all members of the Pension Scheme, including Mr. Stewart. Ms. Barber derived no benefit at all from the distribution.

5. The Board of the Company, as well as the Board of the Founder, Gorstew Limited, were all well aware that surpluses were customarily allocated to member accounts on a triennial basis. Some time in or around July, 2005, the principals of Gorstew Limited held a press conference to advise of the distribution of Employer's Surplus to the members of the Pension Scheme. The press conference was organized by the Pension Scheme and chaired by Mr. Patrick Lynch, with support from Mr. Chris Zacca, Mr. Leo Lambert and Miss Barber, with the knowledge of Mr. Stewart. Under discussion was the allocation of both Employees' and Employers' Surpluses. This press conference was covered by the Jamaica Observer, a member of the ATL Group of Companies and published in its newspaper release of Friday, July 29, 2005.

6. By letter dated January 13, 2011, Miss Barber was instructed to take "leave of absence" for a period of fourteen (14) days, with immediate effect, having regard to recent developments. This letter did not disclose what the "recent developments" were and how or why they necessitated her taking a leave of absence. Also, the letter did not give any indication that the company was in any way dissatisfied with her work or that she was being investigated for misconduct.

By letter dated January 26, 2011, Miss Barber's leave of absence was unilaterally extended for a further fourteen (14) days.

Miss Barber's leave of absence was further extended by letter dated March 16, 2011.

7. In light of the above Miss Barber's representative wrote to Roger Butler, Director of the Company, seeking clarification of the reasons behind Miss Barber being forced to take involuntary leave of absence.

In response to letter from Miss Barber's representative dated January 27, 2011, the Company, by way of a letter dated January 31, 2011, directed Miss Barber to seek clarification of the matters under investigation, from the police.

8. A response was sent to Legal Counsel for the Company (Patterson Mair Hamilton) by way of a letter dated February 9, 2011, which outlined that the police owed Miss Barber no duty under her contract of employment. The letter emphasized that in refusing to communicate with Miss Barber about the matter, the Company was acting in breach of section 19 of the Labour Relations Code, which encourages communication between employers and employees as a means of fostering good industrial relations. The letter also set out that Miss Barber was raising a grievance with the Company and requested that the matter be resolved according to the grievance procedure which the Company should have held, as prescribed by the Labour Relations Code.

9. By way of letter dated March 30, 2011, the Company, in response to previous correspondence from Miss Barber's attorney, seeking clarification as to the motivation for the investigations and the reasons for her involuntary leave of absence, informed Miss Barber as follows:

- (a) It was ATL Group Pension Fund Trustee Nominee Limited that had made the initial complaint to the police
- (b) The matter under investigation was her role in the procurement of Gorstew Limited's approval for the distribution of surpluses and in particular letters dated June 10, 1998, June 7, 2002, and May 12, 2005, and
- (c) Miss Barber was being accused of some wrong-doing or unethical conduct, for procuring the above mentioned approvals, after the surpluses had been distributed.

10. Miss Barber's representatives responded by way of letter on April 6, 2011. The response outlined:

- a. The Company had failed to carry out a grievance hearing despite Miss Barber raising a grievance by way of letter dated February 9, 2011
- b. Up to the letter dated March 30, 2011 (72days), Miss Barber had no knowledge of any alleged misconduct, or
- c. As far as Miss Barber was aware, no internal investigations had been undertaken and no evidence had been presented to her for a response;
- d. There was no specific or formal charge laid against her; and
- e. Miss Barber was being hampered in her ability to prepare for any later disciplinary hearing, as she was being effectively blocked from entering the building which housed both the physical and electronic information and was not being allowed to interview persons who had information, that could assist in her defence

11. On April 18, 2011, Miss Barber's attorneys received a letter refusing to disclose the name of the auditor at PWC, who had allegedly stated that Miss Barber had said that approvals from Gorstew Ltd were not necessary. The letter also advised the refusal to meet with Miss Lynda Mair. The letter also enclosed a dismissal letter addressed to Miss Barber,

dated April 15, 2011, and a cheque representing salary up to April 15, 2011, and 6 weeks' notice pay for unused vacation. The reason given for dismissal was that the Company had lost trust and confidence in her ability to loyally serve the interests of the Pension Scheme. The letter referred to a previously unmentioned attempted sale of an apartment in 2007 and the distribution of the pension surpluses for 1998, 2002, 2005 and 2008. The Company also incorrectly alleged, that Miss Barber had, through her attorney, admitted to requesting that letters on Gorstew Limited's letterhead be back-dated. No such admission was ever made by Miss Barber or on her behalf.

12. Miss Barber's representative responded by letter dated April 20, 2011, stating among other things, that there had been no previous accusation of impropriety in relation to the Airdrie apartment, which was a four year old transaction at the date of the letter. The letter also disclosed that in procuring the letters of consent, Miss Barber was relying on the legal advice of the Company's external legal Counsel, Miss Lynda Mair, a partner at Patterson Mair Hamilton.
13. Miss Barber is confident that at all times, she was acting within her authority and with unquestionable loyalty to the Company and all the employees whose pensions were under her management. At no point did she in any way act in a manner which would have caused the directors and/or board members of the Company, to lose trust and/or faith in her capacity or loyalty. Miss Barber contends that she was unfairly and unjustifiably dismissed.

Miss Barber's complaints are:

- i. The Company failed to carry out any, or any proper investigation into the allegations against her as stated in her letter of termination;
- ii. She was not given a reasonable opportunity to respond to the allegations laid against her as stated in her letter of termination;
- iii. No specific formal charges were ever brought against her as required by the Labour Relations Code;
- iv. She was not afforded a disciplinary hearing as required by the Labour Relations Code;

- v. She was dismissed based on unsubstantiated allegations with respect to several years prior, in respect of which no comment had been invited from her;
- vi. She was not afforded the right of appeal in accordance with the Labour Relations Code, and
- vii. She was unjustifiably dismissed.

14. That the Tribunal must find that the termination of Miss Barber's contract of employment cannot be justified and order reinstatement, even though the view may be held that after all that has transpired between Miss Barber and her employer, it would be foolhardy for her to want to return to such an environment. To ask for reinstatement is her right, protected in law and the Tribunal's denial of that right would be sending a signal that obnoxious and extra-ordinarily bad conduct by an employer is being rewarded and this would not be meeting the ends of justice in Miss Barber's case.

#### **THE TRIBUNAL'S FINDINGS & CONCLUSION:**

In determining and settling this dispute as mandated by the Minister, the Tribunal must ask a number of questions:

1. Is Miss Barber guilty of any misconduct arising from the "indicative offer" from the Chairman of the Pension Fund Board of Trustees, to purchase an Airdrie Apartment, owned by the ATL Pension Fund?

In this regard the evidence is that there was no decision and no meeting to consider a sale. An offer to purchase was received and Miss Barber by email informed the relevant members of the committee that a **"related party"** had made an offer. Her evidence:

*"I sent an email telling everybody that there was a related party transaction, one person responded and asked who was the related party and I responded to that one individual to say who it was."*

Based on the above evidence of Miss Barber and other relevant correspondence from Chairman Mr. Patrick Lynch to her, giving certain instructions as to the procedure to be

followed in handling said matter, the contention of the Company that Miss Barber was involved in a "clandestine scheme" with Mr. Patrick Lynch to withhold material information regarding the sale of the apartment from the Board, with the ultimate objective being to have it sold to him and his wife at an undervalue, cannot be accepted.

Placed at its highest, whatever intentions are being ascribed to Miss Barber with respect to the proposed sale, same was discontinued and the deposit returned. Accordingly, Miss Barber can hardly be penalised in the way she was, for what she might have been thinking with respect to the sale, as it was never proceeded with and Mr. Singh (Legal Officer for the ATL Group) participated in its contemplation as much as she did.

The Tribunal also finds it rather strange, that this took place in 2007 and during all that time Miss Barber was not asked for an explanation, nor reprimanded orally or written, yet it was deemed appropriate to be used against her in 2011, four years after.

2. The Company maintains that Miss Barber's role in the back-dating of letters, purportedly giving consent to the distribution of pension surpluses for the years 1998, 2002, 2005 and 2008, caused it to lose trust and confidence in her, leading to the termination of her contract of employment. It is therefore of paramount importance for the Tribunal to examine her role in the matter. Explanation of her role under cross-examination is reproduced below:

*Q. Now, when the issue of consent first arose who discovered this?*

*A. It was brought to our attention by Miss Lynda Mair.*

*Q. Miss Lynda Mair first brought it to your attention?*

*A. Yes, sir. You are speaking about the issue of consent to writing?*

*Q. No, no, I am not asking you about writing – I am not asking you about writing. I am asking you about consent. I never used the word. I used my language deliberately. I asked you about consent. You said Miss Mair first brought it to your attention?*

*A. In writing. The requirement for it to be in writing, formally.*

- Q. Now, when you spoke with Miss Lynda Mair – when you spoke with Miss Lynda Mair, was it in relation to formatting or the need for this consent*
- A. It was more than that. When I spoke to Miss Mair I asked her if it was appropriate and would it be good order for us being the Fund – seeing that she had given an opinion which inferred or implied that the consent of the founder should be in writing format, would it be in order at this time to reduce into writing the decisions that had taken place regarding the 1998, 2001 and 2004 valuation exercises, which resulted in a surplus distribution recommendation from the Trustee – Board of Trustees at that time which was the corporate – the only trustee, the Corporate Trustee, ATL Group Pension Fund Trustees Nominee Limited, which was appointed by the Board...*
- Q. When you had the discussion with Miss Lynda Mair it was therefore established that for the years in question distributions were made and there was no consent from the founder, am I correct?*
- A. When I had discussions with Miss Mair regarding the three distributions that I spoke about: 1998, 2001 2004, those distributions – those took place in July, 2007, which would have followed her letter of June 2007, and I would have spoken to her again – I say again- reducing in writing the decision and recommendations made by the Board of Trustees regarding the distribution of 1998, 2001 and 2004 – reducing it in writing to regularize the record in terms of her opinion, that it should be in writing to protect the Fund*
- Q. So let me ask you now, how just reduce it in writing going to protect the Fund?*
- A. Well, based on our discussions, putting it in writing and having the Founder execute the document would have regularized the issue.*

In dealing with the above as to the back-dated consents, it is important to emphasize that there were five (5) such letters of consents, three (3) of them produced with respect to

June 10, 1998, June 7, 2002 and May 2005, the 1998 one being prior to Miss Barber's employment. It is important to note, that whatever steps Miss Barber took with respect to these five (5) letters, were taken for the sole purpose of rectifying omissions which had come to light and presented a problem, because Mr. Butch Stewart had discovered the absence of written authority for the payment out of pensions, during the relevant period of five (5) years and had stated that "He wanted his money back."

In this regard, the clear evidence of Miss Barber is, that when this matter was brought to her attention, she discussed possible solutions to the problem with Miss Lynda Mair, one of the attorneys in the firm of Patterson Mair and Hamilton, external counsel to the Company, and Miss Mair had suggested certain ways of dealing with the absence of the written consents. The sole purpose of her suggestions was to correct omissions made, before Miss Barber's time and during her tenure in office. It should be noted, that none of these payments was made to Miss Barber nor did she derive any benefit from any of these payments.

The Tribunal finds it inexplicable, that in respect of a matter on which the Company placed so much significance in justification of the dismissal of Miss Barber, it did not choose to call Miss Mair as a witness, despite the importance they attached to these omissions. Indeed, the Company went to great lengths and no doubt considerable expense, to bring Mr. Speckin- Forensics Document Analysis Ink Dating Specialist - to testify as to the 'back-dating', when all this might have been avoided with the assistance of Miss Linda Mair's testimony, as to what she had advised Miss Barber to do, by way of a possible appeasement of Mr. Stewart's concerns as to the absence of consent for the payment of surpluses made within the Pension Scheme. Was it possibly Miss Lynda Mair who had advised Miss Barber as to the course adopted?

It is clear to the Tribunal, that the letters were prepared and dated retrospectively, to apply to the relevant years, in order to satisfy Mr. Butch Stewart that from 1998 onwards, when payments were being made, these letters had been prepared in respect of each of the years involved, to regularize the legal requirements of written consent.

The unchallenged evidence is that Miss Barber discussed the matter with Miss Mair and it is unfortunate that Miss Mair was never called to testify as to what advice she gave to Miss Barber. However, it is clear to the Tribunal, that what was referred to as “back-dating”, was really the creation of letters for each relevant year and giving them a date for the year in which each one was relevant. Could this advice have been that for each year a letter should be prepared and dated appropriately?

The Tribunal has also concluded that it is unfortunate that Mr. Gordon “Butch” Stewart, who is the complainant in this matter on behalf of Gorstew, was not himself called to testify in this connection. We should mention that Miss Barber’s attorney applied for Mr. Stewart to be called, but this application was firmly resisted by Mr. Wildman on behalf of Mr. Stewart and the Tribunal therefore did not get the benefit of his testimony.

In light of above, the Tribunal is of the view that there was no justification, to have dismissed Miss Barber in the way that she was, by being unceremoniously sent on leave, without any explanation as to why, by having the police search her house the following day, without her permission, and by being dismissed without being given a chance to explain either of the above allegations, or to invoke the protection of the Labour Relations Code (LRC) in her favour.

3. The Tribunal accordingly rejects the submission of Mr. Wildman as stated in paragraph 67 of his closing submission as follows:

“Under normal circumstances, we fully accept that the Company has to follow the Labour Code before dismissing an employee. However, this is a highly exceptional case. It is our submission that the strict application of the provisions of the Labour Code is not appropriate.”

**Section 3(4) of the Labour Relations and Industrial Act states:**

*“A failure on the part of any person to observe any provision of a Labour Relations Code which is for the time being in operation shall not of itself render*

*him liable to any proceedings but in any proceedings before the Tribunal or a Board any provision of such Code which appears to the Tribunal or a Board to be relevant to any question arising in the proceedings shall be taken into account by the Tribunal or Board in determining that question."*

The Code is intended for the protection of the employer and the employee and should not be varied in application depending on the circumstances put forward by either party to justify its non-observance. It is well established, judicially and otherwise, that observance of the Labour Relations Code is mandatory in the settlement of disputes before the Industrial Disputes Tribunal and we find Section 22 of said Code to be relevant in this dispute. This position finds support in the highest authority of **Jamaica Flour Mills Ltd. v. IDT and the NWU Privy Council Appeal NO. 6907 2003.** and **Village Resorts Limited v. The Industrial Disputes Tribunal and Others (1998) 35 JLR 292.**

### **Section 22 Disciplinary Procedure**

*(i) Disciplinary procedures should be agreed between management and worker representatives and should ensure that fair and effective arrangements exist for dealing with disciplinary matters. The procedure should be in writing and should-*

- (a) specify who has the authority to take various forms of disciplinary action, and ensure that supervisors do not have the power to dismiss without reference to more senior management;*
- (b) Indicate that the matter giving rise to the disciplinary action be clearly specified and communicated in writing to the relevant parties;*
- (c) give the worker the opportunity to state his case and the right to be accompanied by his representatives;*
- (d) provide for a right of appeal, wherever practicable to a level of management not previously involved;*
- (e) be simple and rapid in operation.*

We therefore add that in light of the above, we entirely disagree with Mr. Wildman's conclusion, that the nature of these allegations against Miss Barber justified a complete disregard of the requirements of the Labour Code or rules of natural justice. We also conclude that none of the above justified her ignominious dismissal.

The Tribunal accordingly concludes, that the manner in which Miss Barber was dismissed and the ignominious way in which she was sent home and her house searched by the police the following day, were totally unjustified, demeaning, unwarranted and in total disregard of the Labour Relations Code, as well as her dignity.

Having considered the above matters the Tribunal has no difficulty in coming to the conclusion that Miss Catherine Barber's contract was improperly terminated and accordingly cannot be justified. Consequently, taking into consideration all the circumstances including Catherine Barber's eleven years of outstanding and unblemished service to the ATL Group Pension Fund Trustee Nominee Limited, the following award is made.



## **AWARD**

The termination of Miss Catherine Barber's employment is unjustified and accordingly, consistent with section 12(5)(c)(iii) of the Labour Relations and Industrial Disputes Act 1975, the Tribunal makes the following Order:

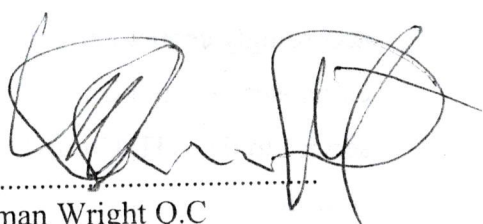
(i) That Miss Barber be reinstated in her employment on or before October 12, 2015, with payment of all emoluments from the date of termination to date of reinstatement

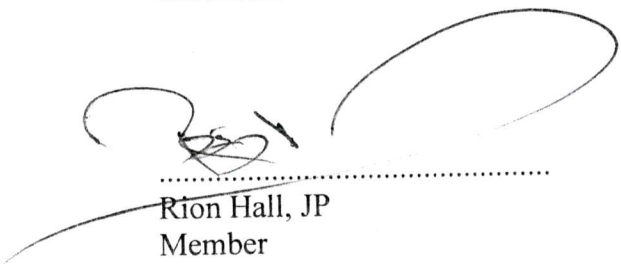
Or

(ii) On failure to comply with (i) above, Miss Catherine Barber be Compensated in the amount equivalent to two hundred and sixty (260) weeks total emoluments at the current rate, in full and final settlement of this dispute for the unjustified termination of her employment.

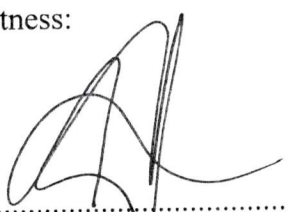
**DATED THIS 23<sup>rd</sup> DAY OF SEPTEMBER 2015**

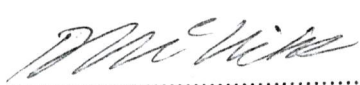


  
.....  
Norman Wright Q.C.  
Chairman

  
.....  
Rion Hall, JP  
Member

Witness:

  
.....  
Gary Lediard  
Secretary to the Division

  
.....  
D. Trevor McNish  
Member